(2)

No. 99-973

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHN BAKER,

Petitioner,

v.

ANITA JOHN,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Alaska

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT

This case involves the custody of two minor Indian children, and the essentially state law question of whether state courts can extend comity to tribal court proceedings.

Petitioner John Baker is an Athabascan Indian and a member of the Native Village of Northway. Respondent Anita John is an Athabascan Indian and a member of the Native Village of Mentasta.

1. Mr. Baker was 25 when he started his relationship with the 14-year-old Ms. John in early 1990. Two children resulted from this relationship, John Baker Jr., born July 31, 1991, and Emmanuel Baker, born June 30, 1992. Following a series of alcohol-related domestic assaults perpetrated by Mr. Baker, for one of which he was convicted, the couple separated shortly after Ms. John turned 18, in 1993.

Initially, the parents were able to acquiesce in a mutually acceptable custody arrangement on their own. In the spring of 1995, Ms. John approached Alaska's Child Support Enforcement Division about obtaining financial support for the children from Mr. Baker. However, that agency, notoriously slow, did not serve Mr. Baker with its support papers until several months later.

Meanwhile, on July 31, 1995, Mr. Baker filed a petition with the Northway Tribal Court to enter a custody decree in his favor – the same court whose jurisdiction, and even existence, Mr. Baker now contests. The Northway Tribal Court initially conferred with representatives of Mentasta, to avoid any jurisdictional competition between the two, and obtained the approval of Mentasta's representatives to have the case go forward in the Northway Tribal Court. This was with the approval of Ms. John, who felt that a court order would reduce conflicts and confrontations, and felt that Mr. Baker would be more accepting of a court order issued by the Tribal Court of his own Village, Northway. Therefore she filed her own petition with the Northway Tribal Court, in August 1995.

The Northway Tribal Court held a hearing on August 29, 1995, with both parents attending. At the conclusion of the hearing, the Northway Tribal Court issued a temporary order, calling for the children to spend alternating months with their father in Northway and their mother in Mentasta, and indicating that a follow-up hearing to resolve custody on a permanent basis would be held prior to the older child's entry into kindergarten (September 1996). The Northway Court also specified that no child support was to be ordered.

Shortly after the hearing, Mr. Baker was served with the administrative support papers from the Alaska Child Support Enforcement Division, in the case initiated by Ms. John several months previously. As the Northway Tribal Court had ordered that neither party should pay support, getting the CSED papers was particularly galling to Mr. Baker, since he did not understand at that point that Ms. John was not attempting to circumvent the Northway order.

Adding to his frustration, Mr. Baker was arrested for Driving While Intoxicated three days after the Tribal Court hearing. This arrest led to a conviction and sentence which temporarily prevented him from exercising his time under the month-on-month-off schedule.

2. In December 1995, Mr. Baker hired a Fairbanks attorney to file the identical custody suit against Ms. John in Alaska's state superior court that he had earlier filed in the Northway Tribal Court. Mr. Baker's "Child Custody Jurisdiction Affidavit" (required under state law to be filed along with the custody complaint in order to establish the basis for the state court's jurisdiction) falsely swore: "The plaintiff is unaware of any custody proceeding regarding the children, except as provided herein, in Alaska, or any other jurisdiction," and "Father has not participated as a witness, party, or in any other fashion in any custody proceeding in Alaska or in any other jurisdiction."

Ms. John filed a motion to dismiss the complaint on the basis of the pending Northway Tribal Court proceedings initiated by Mr. Baker. While the motion was pending, the superior court entered a temporary custody order which paralleled the Northway order, alternating months with each parent. However, in April 1996, the superior court, without holding a hearing, changed that order to specify that primary custody would be awarded to Mr. Baker *pendente lite*.[1]

The superior court in July 1996 issued a decision denying Ms. John's motion to dismiss. A half-day court trial was held in March 1997, following which the superior court awarded custody to Mr. Baker.

3. Ms. John appealed the superior court's decision to the Alaska Supreme Court. In March 1998, the Alaska Supreme Court *sua sponte* ordered supplemental briefing on several issues related to the February 1998 "Indian country" decision of this Court in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), and requesting the State of Alaska to file an *amicus* brief.

The United States thereupon sought and was granted leave to file its own *amicus* brief, and *amici* briefs were

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[1] This followed an incident in which respondent, realizing that she was relapsing into her own drinking problem, called petitioner to come and pick up the children. This was characteristic of the working relationship the two parents had had until that point. As the state trial court explicitly found, both parents have a severe alcohol problem. Each tended to call on each other in times of need, to care for the children when his/her own alcohol abuse exceeded his/her ability to control it. Respondent did so in March 1996, but following that, petitioner filed a motion to modify the temporary custody order and the state superior court, without holding a hearing, did as he requested.

also filed on behalf of several Alaska Native organizations.

The United States started with the premise that Northway was a federally recognized Indian tribe, and urged the Alaska Supreme Court to recognize that a tribe could possess sovereignty over its tribal members regardless of whether the tribe occupied "Indian country"; and to rule that Congress had not intended to eliminate tribal jurisdiction over tribal members in enacting the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (1971), codified as amended at 43 U.S.C. §§ 1601 *et seq.*

The State of Alaska agreed that Northway was a federally recognized Indian tribe. It also agreed that tribes could possess sovereignty over tribal members outside "Indian country"; that tribal law would govern tribal child custody disputes resolved in tribal tribunals; and that ANCSA did not eliminate tribal jurisdiction over tribal members. The State urged the court, however, to reject respondent's argument that Northway's proceedings were entitled to full faith and credit, and instead to rule that comity was the appropriate vehicle through which to recognize the tribal proceedings in this case.

In its opinion, the Alaska Supreme Court by and large followed the urging of the United States and the State of Alaska. It held that federally-recognized tribes such as Northway could resolve custody disputes between tribal members without regard to whether the tribe occupied Indian country. Most significantly for purposes of this petition, the Alaska Supreme Court agreed with the State of Alaska that comity was the appropriate vehicle through which to determine what deference to give to the pending tribal court proceedings. (The only major departure from the positions advanced by the United States and the State of Alaska was the court's

decision not to overrule its *Nenana* line of cases,[2] instead distinguishing them on the basis that those cases involved "child custody proceedings" within the meaning of the Indian Child Welfare Act, 25 U.S.C. §§ 1901, 1903(1) (hereafter "ICWA"), whereas the dispute between Mr. Baker and Ms. John did not.) The case was remanded to the superior court for application of the comity framework to the facts, with particular inquiry into whether the children would be eligible for membership in the Native Village of Northway, and whether one could appeal from decisions of the Northway Tribal Court. Pet. App. 57-58.

Petitioner now seeks to have this Court accept this case to rule that the lower court erred in deferring to the federal government's recognition of Northway as an Indian tribe, and in ruling that this case is not governed by the Indian Child Welfare Act.[3]

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[2] From *Native Village of Nenana v. State Dept. of Health & Social Services*, 722 P.2d 219 (Alaska 1986), *cert. denied*, 479 U.S. 1008 (1986), the first of several pre-1993 cases holding that if a child protective case was filed initially in state court, a tribe could not force the state court to transfer that case to its tribal court under 25 U.S.C. § 1911(b) until the Secretary had approved a re-assumption petition under 25 U.S.C. § 1918, and suggesting in *dicta* that tribes might lack authority to deal with child custody proceedings at all under Pub. L. No. 83-280, 67 Stat. 588 (1953) (hereafter "P.L. 280"), extended to Alaska by Pub. L. No. 85-615, 72 Stat. 545 (1958). The Ninth Circuit took issue with the latter proposition, although agreeing with the former, in *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991); and indeed the broader reading of *Nenana*, if intended, would put Alaska law at odds with case law from federal and other state courts, *see Venetie*, 944 F.2d at 559-561. The Alaska Supreme Court's opinion in this case signals a rapprochement between the state and federal lines of authority, even though it refrains from explicitly overruling *Nenana*.

[3] Petitioner has not sought *certiorari* on the issue to which the lower court devoted most of its analysis, and with which the

ARGUMENT

There are both procedural and substantive reasons why the petition should be denied. The lower court ruling lacks finality; the first and second questions presented were not raised below; the third question presented is too procedurally convoluted and inconsequential, even to these parties, and the state court decision rests on an independent and adequate state ground in any event; none of the issues posed have led to any conflicts among the lower courts; and petitioner's historical analysis is flawed and provides no reason for plenary review by this Court.

I. This case does not present a "final decision."

To be reviewable, the state court judgment "must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551 (1945). "[T]he requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up – for example, where liability has been determined and all that needs to be adjudicated is the amount of damages." *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948). If the remand leaves open some matter that is not merely ministerial and that might itself create a federal question, such as a remand for a new trial, the judgment is normally deemed nonfinal and nonreviewable. *Houston v. Moore*, 3 Wheat. 433, 434 (1818); *San Diego Gas & Elec. Co. v. San Diego*, 450

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dissent took issue, *i.e.*, whether tribes retain non-territorial membership-based jurisdiction that includes the authority to decide child custody disputes, Pet. App. 32-44, 81-139; nor is this issue even arguably subsumed in the questions he does present. *See* Rule 14.1(a).

U.S. 621, 632-33 (1981); *O'Dell v. Espinoza*, 456 U.S. 430 (1982). Although the Court has adopted a pragmatic and flexible approach in interpreting this requirement, it has also warned that this pragmatism cannot "swallow the rule" of finality embodied in 28 U.S.C. § 1257. *Flynt v. Ohio*, 451 U.S. 619, 622 (1981).

In this instance, by the very terms of the Alaska Supreme Court's order, the case has been remanded to the superior court to determine whether or not comity should be extended to the tribal court proceedings as a matter of state law. Thus, the judgment below is clearly non-final. The petitioner may well prevail on remand and never go back to tribal court at all, since he will no doubt urge upon the superior court every possible reason for not extending comity. Further, even if the case is returned to the Northway Tribal Court, there is no predicting whether that court's final order will award custody to the petitioner or the respondent.

The decision below does not qualify under any of the limited exceptions to the finality requirement enumerated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-85 (1975) and restated in *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997) (declining to expand *Cox Broadcasting* list of exceptions). The outcome of the state court proceedings is not "preordained"; the federal issue will not "require decision regardless of the outcome of future state court proceedings" (as petitioner may still prevail on the comity determination, mooting further dispute over the federal issues); there is no governing state law which bars him from preserving his federal claims for later review by this Court if he so chooses; and there is no serious erosion of federal policy which would flow from a refusal to

review the state court proceedings at this interlocutory juncture.[4]

Probably the closest finality analogue is to the pre-1948 case law when state courts had a decision-making role on petitions for removal from state to federal court. Finality was lacking in a judgment of the highest state court rejecting a petition for removal of a case to federal court and remanding for further trial proceedings. R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice § 3.7 at 106-07 (7th ed. 1993). *Ipso facto*, a judgment of the highest state court reversing a trial court's denial of a petition for removal, and remanding for further proceedings to make a new removal determination, would fall even further short of the prerequisite finality requirement. There is no reason to apply a different rule of finality here where the issue involves a state court deciding whether or not to defer to a tribal court.

II. Petitioner's first and second "questions presented" were not raised before the court below, and regardless do not present issues meriting a grant of *certiorari*

Rule 14.1(g)(i) requires that the petition specify the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal

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[4] Additionally, petitioner has suggested in the superior court that both he and respondent were living within "Indian country" at the time the Northway proceedings were filed; he claims that he was living on an Alaska Native allotment in Northway, and that she was living on an Alaska Native allotment in Mentasta. *Cf. Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, ___ n. 2. Further development of these questions is currently being explored at the trial court level, additionally underscoring the lack of finality in the decision below.

questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific references to places in the record where the matter appears, so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. Compliance with these requirements is notably absent from the petition in this case.

It is essential to the jurisdiction of this Court under § 1257 that a substantial federal question have been properly raised in the state court proceedings. The validity of a statute or regulation is "drawn in question" only if "the power to enact it, as it is by its terms, or is made to read by construction, is fairly open to denial, and is denied." *Miller v. Cornwall R. Co.*, 168 U.S. 131, 133 (1897); *see also United States ex rel. Champion Lumber Co. v. Fisher*, 227 U.S. 445, 449-51 (1913). It is not enough to draw a provision into question by controverting rights claimed thereunder, or by disputing an act done by virtue of such statute or treaty. *Baltimore & Potomac R. Co. v. Hopkins*, 130 U.S. 210 (1889); and *see Phillips v. United States*, 312 U.S. 246, 252 (1941).

Petitioner contends here that the Interior Secretary's recognition of Northway's tribal status is an *ultra vires* act violating the Constitutional separation of powers provision. The constitutional argument is not mentioned in the lower court opinion, and the issue of Secretarial authority receives only a passing reference, Pet. App. 21, *because these arguments were not made before the court below.*

In fact, petitioner's position below was quite the opposite. Before the Alaska Supreme Court petitioner's counsel stated, "Mr. Baker has also asked me to tell this court he is a strong supporter of tribal courts. He would

like to see tribal courts recognized, tribal court jurisdiction recognized, as long as they are fair. He feels very strongly and has asked me to tell you this."

Even the dissenting opinion below (which subordinated succinctness to comprehensiveness and omitted no line of attack suggested by the parties or otherwise) did not note any separation of powers or *ultra vires* issue, and in fact acknowledged that federal recognition of the Native Village of Northway was a *fait accompli*. Pet. App. 73, 125 ("It is also true that tribal recognition by the Department of the Interior is given conclusive deference as a non-justiciable political question, presumably because the Department has been delegated authority by Congress to make such a determination").[5] Plainly, those issues were simply never presented to the court below.

Even if they had been, arguments about Northway's tribal status, as framed by petitioner, would not merit this Court's review. Petitioner's argument that in 1993 the Secretary of the Interior lacked power to confirm tribal status has not gained acceptance legislatively, administratively or judicially. The 1993 list was just one link in a chain of lists, which the Secretary had started publishing in 1979, to resolve confusion over which entities were and were not "tribes," *see* D. Getches, D. Rosenfelt, C. Wilkinson, Federal Indian Law at 238-39 (1979). These lists were promulgated pursuant to regulations on the "Federal Acknowledgement Process" (FAP), which provide for lists of recognized tribes and for administrative procedures for entities excluded from the lists but wishing to obtain federal recognition. The FAP regulations, 25 C.F.R. part 83 (1999), were initially proposed in June 1977, and

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[5] The *ultra vires* argument not raised before the lower court in this case is, however, before the Alaska Supreme Court in another case currently awaiting decision: *Native Village of Mekoryuk et al. v. Moses*, Alaska Supreme Court Case Nos. S-08908, S-08919.

after much discussion finalized in September 1978 (43 Fed. Reg. 39361, Sep. 5, 1978), with the first list published a few months later. 44 Fed. Reg. 7235 (Feb. 6, 1979).

During this period, Congress considered special authorizing legislation, but did not enact any, after being assured by the Secretary that existing statutory authority, although general rather than specific, was adequate. *See* "Recognition of Certain Indian Tribes: Hearing on S. 2375 before the Senate Select Comm. on Indian Affairs," 95th Cong., 2d Sess. 15 (1978); "Federal Recognition of Indian Tribes: Hearing on HR. 13773 and Similar Bills (Including H.R. 12996) before the Subcomm. On Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs," 95th Cong., 2d Sess. 14 (1979). Thus, the lack of specific authorizing legislation was not, as petitioner argues, indicative of Congressional intent that such lists should not be promulgated, but indicative of Congressional acquiescence that such legislation was unnecessary to authorize secretarial recognition.

The list and the FAP added much-needed structure to these questions in the lower 48, but initially only added to the confusion in Alaska. The 1979 list left Alaskan tribes off, promising to address them later. The 1982 list included Alaskan tribes, but with a cryptic preamble that left their status uncertain, *see* 47 Fed. Reg. 53130, 53133-34 (Nov. 24, 1982). The 1983 list excluded the Alaskan preamble, leaving advocates arguing about the significance of that omission; *see* 48 Fed. Reg. 56862 (Dec. 23, 1983). The 1988 list greatly expanded the scope of Alaskan entities to include ANCSA corporations, with a longer and more confusing preamble. *See* 53 Fed. Reg. 52832 (Dec. 29, 1988). In sum, the Alaska lists up through 1988 managed to generate controversy without achieving clarity; but at no point did the Interior Department express any hesitation about its authority.

The Interior Department under the Bush Administration decided to put an end to this administrative ambiguity, recognizing that the confusion it had generated was largely responsible for the judicial confusion in such cases as *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32, 34, 43 (Alaska 1988), in which a sharply divided Alaska Supreme Court ruled as a matter of law that, as of 1988, the federal government did not intend Alaska Native villages to be treated as sovereigns; and in *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 561 (9th Cir. 1991) (the "Venetie adoption" case), which similarly found the historical record as to explicit federal recognition non-dispositive, but remanded the case to the federal district court for a fact-specific determination as to whether Venetie and Fort Yukon were tribes.[6]

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[6] On remand, the district court bifurcated the issues as to the two villages, stayed the action as to Fort Yukon, and consolidated Venetie's tribal adoption case with a separate case filed against Venetie to enjoin its imposition of a tribal business tax on its former reservation acquired under ANCSA. Following a week-long trial, the federal district court issued three separate decisions: first, that Venetie was a federally-recognized tribe and therefore could validly grant adoptions over tribal children, *Native Village of Venetie I.R.A. Council v. Alaska*, 1994 WL 730893 (D. Alaska, December 23, 1994) ("Decision – Tribal Status"); second, that Venetie's "Indian country" status did not bear on its ability to grant tribal adoptions and the two cases could therefore be re-bifurcated, *Native Village of Venetie I.R.A. Council v. Alaska*, 1994 WL 730887 (D. Alaska, December 23, 1994) ("Case Status – Adoption Case"); and third, Venetie did not occupy Indian country and therefore could not impose the tax, *Native Village of Venetie I.R.A. Council v. Alaska*, 1995 WL 462232 (D. Alaska, August 2, 1995) ("Decision – Indian country").

On the tribal adoption ruling, the State of Alaska initially moved for reconsideration, but subsequently withdrew its motion, chose not to appeal, and stipulated that Fort Yukon, too,

It was to bring much-needed clarity to this area that former Interior Solicitor Sansonetti undertook, starting in 1991, a comprehensive review of federal Indian law in Alaska. After over a year of effort, Solicitor Sansonetti's opinion found, *inter alia*, that there were indeed federally recognized tribes in Alaska, but that the ANCSA lands occupied by those tribes were not "Indian country." The task of delineating which tribes merited federal recognition, the opinion put off for another day, although it suggested that the modified ANCSA list (containing over 200 Alaska Native villages) was the appropriate starting point.[7] Since the opinion was issued shortly before Solicitor Sansonetti left office, the task of finalizing the list fell to his successors. Following solicitation of comments from the State, the affected tribes, and other interested entities, the Interior Department in October 1993 published its list of federally recognized tribes in Alaska. The language of the preamble made it crystal clear that the Secretary intended to eliminate any ambiguity and

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would, if a trial were held, qualify as a federally recognized tribe. *Native Village of Venetie I.R.A. Council v. Alaska*, No. F86-0075 CV (D. Alaska, Sep. 20, 1995) ("Partial Motion for Summary Judgment – Tribal Status") and December 12, 1995 ("Order – Motions for Reconsideration").

The district court's opinion in Venetie's "Indian country" tax case, though reversed by the Ninth Circuit in *Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Government*, 101 F.3d 1286 (9th Cir. 1996), was subsequently essentially affirmed by this Court in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998).

[7] "We have rejected the notion that there are no tribes in Alaska. Which Native villages are tribes is a fact-specific determination beyond the scope of this opinion." Solicitor's Opinion No. M-36975, "Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers," Jan. 11, 1993, at 132. The "modified ANCSA list," *id.* at 59, refers to 25 U.S.C. §§ 1610, 1615, as supplemented by the Secretary.

declare "expressly and unequivocally" that the Alaskan tribes on the list had the same "government-to-government relationship with the United States" and the "right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes," 58 Fed. Reg. 54364, 54365-66 (Oct. 21, 1993). Thus, not until Solicitor Sansonetti undertook his comprehensive review, paving the way for the 1993 list, did Alaska get the benefit of the lucidity that the lists had earlier brought to tribal recognition questions in the lower 48.

Petitioner's argument that the 1993 list was *ultra vires*, although not raised below, has been raised and rejected previously, in a different case before a federal court, in *Native Village of Venetie I.R.A. Council v. Alaska*, 1994 WL 730893 (D. Alaska, December 23, 1994) ("Decision – Tribal Status"), slip op. at 8-11. The court reasoned that the Interior Department had been deciding federal recognition issues for more than 90 years with Congress's knowledge and acquiescence, citing *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915) (Congressional acquiescence for over 80 years in Interior Department's exercise of public lands authority).[8] Thus, the Alaska

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[8] Because the tribal adoption in that case had occurred prior to the 1993 list, and because the parties disagreed as to the effect of the list on pre-1993 actions, the opinion went on to analyze the tribal status of Venetie without regard to the list, concluding that Venetie was a tribe regardless of the list. The same court later re-affirmed its holding on the validity of the list as to the Native Village of Fort Yukon in *Native Village of Venetie I.R.A. Council v. Alaska*, No. F86-0075 CV (HRH) (D. Alaska, September 20, 1995) ("Partial Motion for Summary Judgment – Tribal Status"), slip op. at 6-11; and as to the Native Village of Tyonek in *Native Village of Tyonek v. Puckett*, No. A82-0369 CV (HRH) (D. Alaska, October 29, 1996) ("Order: Tribal Status/ Sovereign Immunity"), slip op. at 11-18.

Supreme Court here, though not discussing the *ultra vires* or separation of powers arguments, reached a result consistent with the decisions of the relevant federal district court.

Following issuance of the 1993 list, Congress in 1994 reviewed and effectively endorsed the list, enacting the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (hereafter Tribe List Act). Title I (codified at 25 U.S.C. §§ 479a *et seq.*) explicitly required the Secretary to publish a list of tribes annually. Title II of the same enactment (the Tlingit-Haida Status Clarification Act, codified at 25 U.S.C. § 1212 *et seq.*), added to the list one Alaskan tribe the Secretary had excluded. Petitioner argues, thrice, that the "texts of §§ 102 and 104" of the Tribe List Act do not dictate that the "tribal recognition" contemplated by the legislation goes beyond eligibility for programs and services. Pet. 29. This fairly clumsy elision of § 103 is presumably to gloss over the fact that the text of § 103, the congressional findings, includes the finding that "the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes," § 103(2). Further confirmation of Congress' intentions appears in the text of Title II of that same Pub. L. No. 103-154, the Tlingit-Haida Status Clarification Act, which refers to "the government-to-government relationship between the United States and other federally recognized Alaska Native tribes," 25 U.S.C. § 1214(a). Further, by arguing that the Secretary was authorized to recognize Alaska tribes as "eligible for programs," but not sovereign, the petition also ignores the fact that Congress, in an almost contemporaneous legislative enactment, specifically prohibited the Secretary from drawing such

distinctions as to the privileges and immunities of different categories of federally recognized tribes.[9]

The clear and unambiguous text of these statutes removes any need to consult their legislative history; but if the legislative history is to be considered nonetheless, it ought to be read without selective and misleading omissions. Congress in 1994 was well aware, not only of the consequences of federal tribal recognition, but also of the Interior Department's specific statements about Alaska tribes,[10] and if it wanted to overrule those clear declarations, it would have done so in terms equal in clarity to those it used to add the Tlingit-Haida Central Council to the list.

Petitioner faults the court below for not giving controlling weight to the material selectively excerpted in the petition's last footnote, Pet. 29-30 fn. 11 (thereby underscoring his own failure to bring this, or any of the rest of his argument on this point, to that court's attention). But the paragraph in the report immediately preceding the

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[9] Pub. L. No. 103-263, § 5(b), 108 Stat. 709 (1994), adding subsecs. (f) and (g) to 25 U.S.C. § 476 of Indian Reorganization Act.

[10] *See Native Village of Venetie I.R.A. Council v. Alaska*, 1994 WL 730893 (D. Alaska, Dec. 23, 1994) ("Decision – Tribal Status"), slip op. at 10; *see also* H.R. Rep. No. 103-781 (1994) at 4, reprinted in 1994 U.S.C.C.A.N. 3768, 3771; H.R. Rep. No. 103-800 (1994) at 4-5; and "Central Council Tlingit and Haida Status Clarification: Hearing on S. 1784 before the Subcommittee on Native American Affairs of the Committee on Natural Resources, House of Representatives," 103rd Cong., 2nd Sess. (1995) at 5 (Interior Department official explains to House Natural Resources Committee that Alaskan villages on the 1993 List "are not simply eligible to receive services, or are recognized as tribes for certain narrow purposes, but are recognized as political governmental entities who have maintained a government-to-government relationship with the United States by virtue of their special status as Indian tribes").

paragraph quoted by petitioner makes it clear that the Committee's concern was over Solicitor Sansonetti's conclusion that Congress "has left little or no room for tribes in Alaska *to exercise governmental authority over land or nonmembers*" (emphasis added).[11] Noting that the Solicitor's conclusion on that point was controversial, was subject to review at the administrative level, and was being litigated as well, the Committee report was drafted to avoid taking a stand on that question.[12] It was thus Solicitor Sansonetti's conclusion that Alaska tribes had no jurisdiction *over lands and non-members*, not his endorsement of Alaska tribal jurisdiction *over tribal members*, that concerned the Committee. By encouraging the Secretary to "continue the current policy" as of 1994, the Committee Report endorsed the 1993 preamble's stance, *i.e.*, that Alaska Native Villages had sovereign authority over their members, but that their authority over lands and non-members was an unresolved question. The Act was neither to expand authority beyond, nor diminish it below, that level.[13]

The petition's argument on this point suffers a final defect, in that petitioner focuses his attack on the wrong list. The petition criticizes the court below for "ignoring" the fact that the Tribe List Act authorized the Secretary to publish "a" list of recognized tribes, as distinguished

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[11] H. Rep. No. 103-781, 4-5, reprinted in 1994 U.S.C.C.A.N. 3768, 3771.

[12] Chronologically, this report was written before the Alaska Federal District Court issued either its 1994 "tribal status" decision in the Venetie adoption case or its 1995 "Indian country" decision in the Venetie tax case. See fn. 6 *supra*.

[13] In fact, by arguing the Report should be read to "deny to . . . any Native organization any degree of sovereign governmental authority over . . . persons in Alaska," Pet. 30 fn. 11, petitioner tries to mis-use the Report to advance a diminution in tribal authority, something the Committee itself clearly wanted to avoid.

from "the" list published in 1993. Pet. 29. However, the Secretary has published several lists subsequent to enactment of the Tribe List Act, which have similarly included the Native Village of Northway; and, since the first post-enactment list, *see* 60 Fed. Reg. 9250, 9255 (Feb. 16, 1995),[14] predated by several months petitioner's filing of his custody case before the Northway Tribal Court in July 1995, the pertinent inquiry (were any such issue properly preserved in the first place) would be whether the Tribe List Act authorized, under appropriate *Chevron* deference analysis,[15] the lists published subsequent to its enactment. Thus, even assuming the petition were correct in asserting that the 1994 Tribe List Act did not ratify "the" 1993 list, that is not the relevant issue. Tellingly, the petition does *not* contend that there was anything unauthorized or *ultra vires* about the 1995 and succeeding lists; it does not mention those lists at all.

III. Petitioner's third "question presented" is too convoluted and inconsequential to merit *certiorari*, and in any event there is an independent and adequate state-law ground for the decision below.

The remaining point for which *certiorari* is sought is whether an inter-parental custody dispute between two

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[14] *See also* 61 Fed. Reg. 58,211, 58,215 (Nov. 13, 1996); 62 Fed. Reg. 55,270, 55,275 (Oct. 23, 1997); 63 Fed. Reg. 71,941, 71,946 (Dec. 30, 1998).

[15] *Chevron v. National Resources Defense Council*, 467 U.S. 837 (1984). The petition cites a 1965 case, *American Shipbuilding Co. v. N.L.R.B.*, 380 U.S. 300 (1965), for the proposition that administrative agencies cannot make policy decisions for Congress, Pet. 26. This overlooks the impact of *Chevron*. Deference would apply, not only to the Secretary's interpretation of 25 U.S.C. §§ 2 and 9 in publishing the lists from 1978 to 1993, but also to the Secretary's interpretation of the Tribe List Act in publishing the 1995 and subsequent lists.

unmarried Indian parents is a "child custody proceeding" within the meaning of ICWA.

Petitioner is somewhat ill-positioned to raise this point as well. Before the state superior court, petitioner argued strenuously that his case against respondent was *not* an ICWA "child custody proceeding." Before the Alaska Supreme Court, he argued the contrary. That court, though finding he had arguably not preserved the point, chose to address it, Pet. App. 12 n. 28.

If this Court chooses to grant *certiorari* and reverse on this point, that would have two implications for the Alaska Supreme Court opinion, neither of which likely would benefit petitioner: (1) the court's rationale below for distinguishing its *Nenana* line of cases,[16] Pet. App.

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[16] The "*Nenana* line of cases" includes *Nenana* itself, *supra*, *Matter of K.E.*, 744 P.2d 1173 (Alaska 1987), and *Matter of F.P.*, 843 P.2d 1214 (Alaska 1992), *cert. denied*, 508 U.S. 950 (1993). The *F.P.* opinion moved away from *Nenana*'s P.L. 280 rationale, *see* fn. 2 *supra*, instead re-affirming *Nenana* on the separate basis that *Native Village of Stevens v. Alaska Management and Planning*, 757 P.2d 32 (Alaska 1988), held as a matter of law that as of 1988 the federal government had not recognized the existence of tribes in Alaska.

Both the United States and the State of Alaska in their *amici* briefs before the Alaska Supreme Court urged that court to overrule *Nenana*. Respondent agreed that the *Nenana* line of cases should be overruled, but also argued that even if the court chose to let that line of authority stand, this case was distinguishable in that (1) it was not a "child custody proceeding" within the meaning of ICWA, (2) Northway's jurisdiction was not premised on "Indian country" and therefore P.L. 280 had no bearing, and (3) the issue did not involve a mandatory § 1911(b) transfer to tribal court of a case first filed in state court, but rather the recognition of a case first filed in tribal court.

The Alaska Supreme Court, ruling narrowly in the tradition of appellate courts, chose to distinguish rather than overrule

11-14, would disappear, a result that might require that court to directly decide whether the *Nenana* line of authority itself should be overruled;[17] (2) the rationale for refusing to extend full faith and credit under ICWA (25 U.S.C. § 1911(d)) to the Northway Tribal Court proceedings, Pet. App. 50-53, would also disappear, leaving respondent with a significantly *stronger* basis for recognition of the tribal court proceedings than the "comity" approach which the court below adopted.

For this reason, respondent has in fact not yet decided whether, should this Court choose to grant *certiorari*, she would argue against this case being found a "child custody proceeding." However, she does feel constrained to point out that the issue is not difficult, and there is absolutely no conflict of authority on whether the term includes custody disputes between unmarried parents. The statutory definition of "child custody proceeding" is given as a list, of four types of cases which are included in the definition (foster care placements, terminations of parental rights, preadoptive placements, and adoptive placements), and two types of cases that are excluded (juvenile delinquency cases "and an award, in a divorce proceeding, of custody to one of the parents"). 25 U.S.C. § 1903(1). Thus, the question is not so much whether a custody dispute between unmarried parents meets the requirements of the divorce exclusion; it is whether such a case meets the requirements of any of the

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Nenana, but acknowledged that its ruling might carry implications for a future case presenting the opportunity to interpret P.L. 280. Pet. App. 17 n. 46.

[17] It also might not. The court might still distinguish *Nenana* on the third ground mentioned in fn. 16 *supra*, *i.e.*, 25 U.S.C. § 1911(b) does not speak to the situation where the tribal court case precedes the state court case. That distinction is suggested by the pre-*Nenana* case of *Matter of J.M.*, 718 P.2d 150 (Alaska 1986).

inclusions, i.e., whether it is a foster care placement, termination of parental rights, preadoptive placement, or adoptive placement. If not, it is not a "child custody proceeding." Those courts that have addressed the issue have had no difficulty in concluding that the definition of 25 U.S.C. § 1903(1) does not encompass inter-parental custody disputes. *Confederated Tribes of Colville Reservation v. Superior Court of Okanogan County*, 945 F.2d 1138, 1140 n. 3 (9th Cir. 1991); *Walksalong v. Mackey*, 549 N.W.2d 384, 387 (Neb. 1996); *In re Defender*, 435 N.W.2d 717, 721-22 (S.D. 1989). *See also DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 514 (8th Cir. 1989); *Custody of Sengstock*, 477 N.W.2d 310, 312-13 (Wis. App. 1991) (stating rule). It seems a poor use of this Court's docket to take up an issue that has created absolutely no controversy whatsoever.

This case also presents an inappropriate case for *certiorari* on this point because there is an independent and adequate state-law basis for the judgment below: comity.

This case was the first opportunity for the Alaska Supreme Court to consider recognition of tribal court proceedings, not solely as a matter of federal mandate, but also as a matter of state judicial discretion. In the *Nenana* line of cases (as well as in the *Venetie* adoption case),[18] the question was whether federal law *required* state court recognition of tribal court proceedings. The court in this case also considered that question, but rejected respondent's argument that federal law mandated recognition of tribal court proceedings,[19] and instead

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[18] See fns. 2 and 16 *supra*.

[19] Ironically, the Alaska Supreme Court did so on the ground which petitioner seeks to have reversed here, *i.e.*, the holding that an inter-parental custody dispute is not a "child custody proceeding" within the meaning of ICWA. Pet. App. 50-51.

directed that such matters be resolved under state-law principles of comity on a case-by-case basis.

Comity is thus distinguishable from "full faith and credit," which is a rule of obligation rather than discretion. Full faith and credit may be a mandate under federal law or under state law. *See Webb v. Webb*, 451 U.S. 493 (1981) (writ of certiorari dismissed for want of jurisdiction where decision of court below rested on Uniform Child Custody Jurisdiction Act rather than Federal Constitution's Full Faith and Credit Clause, because petitioner failed to present federal issue before court below). Comity, on the other hand, functions "not as a matter of obligation, but out of deference and mutual respect," Pet. App. 53, quoting *Brown v. Babbitt Ford, Inc.*, 571 P.2d 689, 695 (Ariz. App. 1977).

The "comity" analysis chosen by the Alaska Supreme Court sets out a framework under which state courts are permitted to recognize tribal court proceedings independently of federal law. That is, even if state courts are not obligated to recognize tribal court proceedings under federal law, that certainly presents no bar to a state court choosing to recognize tribal court proceedings under a discretionary comity approach. State-law comity, as distinguished from federal "full faith and credit" requirements, is a matter peculiarly within the discretion of the state courts being asked to grant it.

There is no indication that Congress intended ICWA to pre-empt state-tribal cooperation, or to prevent states and tribes from using comity or similar tools to establish working relationships among their courts; indeed, ICWA itself explicitly authorizes "States and Indian tribes . . . to enter into agreements with each other respecting . . . jurisdiction over child custody proceedings," 25 U.S.C. § 1919(a).

So, even assuming petitioner prevailed on his statutory interpretation argument, the resolution of that federal question in his favor would certainly not preclude

the Alaska Supreme Court from doing exactly as it did, *i.e.*, extending recognition to the proceedings of another entity as a matter of comity under state law.

IV. Petitioner's flawed historical analysis provides no reason for plenary review by this Court.

Petitioner's historical arguments rely heavily on the proposition that an 1884 enactment represented a Congressional decision against recognition of the existence of tribes in Alaska. Pet. 4-5, 28-29. However, that enactment simply does not contain the pronouncement which petitioner suggests.

The genesis document, the 1867 Treaty of Cession, explicitly recognized that there were "tribes" in Alaska, to be "subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country." Treaty of Cession, March 30, 1867, U.S.-Rus., 15 Stat. 539, Art. III.

The 1884 Act was also predated by Congress's 1873 enactment making Alaska "Indian country" for the particular purposes of the liquor law sections of the Intercourse Act of 1834. Act of March 3, 1873, 17 Stat. 530; *see In re Carr*, 1 Alaska Fed. 75 (D. Ore. 1875).

If Congress had intended in the 1884 Act to negate its prior pronouncements as to "Indian tribes," some indication of that would have to appear in the statutory language. Instead, one actually finds a renewed reference to Alaskan "tribes" in the explicit text of the 1884 statute.[20]

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[20] Act of May 17, 1884 (District Organic Act), 23 Stat. 24, c. 53, sec. 8: "the land not exceeding six hundred and forty acres at any station now occupied as missionary stations *among the Indian tribes* in said section . . . shall be continued in the occupancy of the several religious societies . . . " (emphasis added).

The Act signals no change in policy as to tribal recognition; instead, it defers questions of dealing with Native issues, appointing a commission for study. *Id.*, sec. 12. The 1884 Act also defers land claims issues, with the status quo to be maintained: "the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."[21] Section 13 made an appropriation of $25,000 to the Interior Secretary for the education of Territorial children "without reference to race," but within two months, Congress had made another *Native-specific* appropriation for education,[22] so obviously no policy pronouncement of major import can be read into the appropriation. The plain truth is that the 1884 Act was essentially stop-gap legislation, and will not carry the import with which petitioner seeks to saddle it. In fact, when an Alaskan tribe claimed permanent occupancy rights under that same 1884 Act, this Court explicitly ruled that "what was intended was merely to retain the status quo until further congressional or judicial action was taken," *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278 (1955).

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[21] *Id.* sec. 8. Future Congresses set different routes for title acquisition: for Native Alaskans, the Alaska Native Allotment Act was enacted, Act of May 17, 1906, 34 Stat. 197, formerly codified at 43 U.S.C. § 270-1 (repealed 1971); for others, the general homestead laws were extended to Alaska, Act of May 14, 1898, 30 Stat. 409.

[22] In July of 1884, Congress appropriated $15,000 for the support and education of Indian children of both sexes at industrial schools in Alaska, and another $20,000 for the same purpose was appropriated the following year. See *In re Can-ah-Couqua*, 29 F. 687, 688 (D. Alaska 1887).

Petitioner's snippets of non-statutory "authority" include a colloquy between Sheldon Jackson and Senator Manning Butler, as if Rev. Jackson's "new departure" in Indian policy was in fact incorporated into the 1884 legislation, *i.e.*, to "treat them as American citizens," Pet. 8. In fact, the 1884 Act did not make Alaska Natives into American citizens, and citizenship for Alaska Natives was not forthcoming for well over half of Alaska's territorial history. It was granted in the Citizenship Act of 1924, which applied to Alaska Natives and lower 48 Natives alike, making American citizens of "all non-citizen Indians born within the territorial limits of the United States." Act of June 2, 1924, ch. 233, 43 Stat. 253. Before then, although an Alaska Native could, like his lower 48 counterpart, become a U.S. citizen under the Dawes Act, c. 119, § 6, 24 Stat. 388 (1887), this had to be based upon a showing that he had "voluntarily taken up . . . his residence separate and apart from any tribe of Indians therein, and ha[d] adopted the habits of civilized life." *In re Minook*, 2 Alaska 200, 222 (D. Alaska 1904).

Laws passed between the Citizenship Act in 1924 and enactment of ANCSA in 1971 show that Congress still took the view that it could utilize its authority to "regulate Commerce . . . with the Indian tribes," U.S. Constitution, Art. I, sec. 8, to enact legislation with particular applicability to Alaska Natives, including the Alaska Native Townsite Act in 1926 (c. 379, 44 Stat. 629, formerly codified at 43 U.S.C. § 733 et seq., repealed in 1976); the Tlingit and Haida Indians Land Claims Lawsuit Jurisdictional Act in 1935 (49 Stat. 388);[23] the Alaska Amendment

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[23] By directly authorizing suit for compensation for the taking of aboriginal title, Congress rejected the 1932 intimation in the letter from Secretary Wilbur, relied on by petitioner (Pet. 9), that Alaskan tribes might not be sufficiently self-governing

to the Indian Reorganization Act in 1936 (49 Stat. 1250, 25 U.S.C. § 473a, amending Indian Reorganization Act of 1934, 48 Stat. 984, codified at 25 U.S.C. §§ 461 et seq., especially §§ 473, 479); the Reindeer Industry Act of 1937 (c. 897, 50 Stat. 900, codified at 25 U.S.C. §§ 500-500n); portions of the Alaska Statehood Act in 1958 (Sec. 4 of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), as amended, Pub. L. No. 86-70, 73 Stat. 141 (1959), 48 U.S.C. prec. 21 note);[24] and the extension of P.L. 280 to Alaska's "Indian country" in 1958 (Pub. L. No. 85-615, 72 Stat. 545, amending Pub. L. No. 83-280, 67 Stat. 588 (1953)).

An understanding of this last enactment highlights one of the fundamental flaws in the petition, *i.e.*, its

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to bring suit. Ironically, Secretary Wilbur signed that letter on March 14, 1932, less than three weeks after approving the Solicitor's Opinion "Status of Alaskan Natives," 53 Int. Dec. 593 (Feb. 24, 1932), which concluded, "no distinction has been or can be made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned . . . they are all wards of the Nation, and their status is in material respects similar to that of the Indians of the United States. It follows that the natives of Alaska, as referred to in the treaty of March 30, 1867, between the United States and Russia, are entitled to the benefits of and are subject to the general laws and regulations governing the Indians of the United States," *id.* at 605. It is unclear whether Secretary Wilbur failed to read the letter, or the opinion, or both.

[24] This provision required the State to disclaim any right or title to Native occupied lands, leaving their disposition to the Federal Government, and exempting Native lands from state taxation. Contrary to petitioner's broad intimations, nothing in the Alaska Constitution makes or implies a claim to "exclusive jurisdiction . . . to adjudicate domestic relations matters," Pet. 10, and nothing in the Statehood Act recognizes or accepts such a claim.

inability to distinguish between the concurrent jurisdiction of states and tribes when tribal jurisdiction is premised on tribal membership, and the presumptively exclusive jurisdictional enclaves created when tribal jurisdiction is premised on "Indian country." The petition assumes that the susceptibility of Alaska Natives to state law is somehow inconsistent with tribal status. But a Native Alaskan's membership in a federally recognized tribe does not insulate that individual from the application of state law; outside Indian country, that individual is as subject to state law as any other citizen. Hence, the fact that Territorial authorities frequently opined that Alaska Natives were subject to Territorial laws would not be inconsistent with those Natives' membership in a federally recognized tribe. The barrier to state law is presented, not by tribal membership, but by Indian country.[25] Given that P.L. 280 grants the state authority within what little Indian country still exists in Alaska under *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), there is little room to argue that an Alaska Native is exempt from state law, and no such proposition was announced by the court below.

What tribal recognition does mean is that, in addition to being subject to state law, an Alaska Native may also be subject, as a member of a federally recognized tribe, to tribal law and authority.

Of particular relevance on this point is a 1932 Solicitor's Opinion, "Validity of Marriage By Custom Among the Natives or Indians of Alaska," which stressed that the absence of reservations in Alaska and the historical fact that Congress dealt with Alaska Natives through legislation rather than through treaty (the two facts noted in

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[25] Thus it was the Indian country ruling in *In re McCord*, 151 F.Supp. 132 (D. Alaska 1957), which necessitated the extension of P.L. 280 to Alaska in 1958 to ensure that state law could govern throughout the state.

Secretary Wilbur's 1932 letter, Pet. 9) did not change the conclusion that "marriage among those natives constituting the uncivilized tribes, if entered into in accordance with their long-established customs, should be recognized as valid until Congress directs otherwise, irrespective of the Territorial laws . . . ," 54 Int. Dec. 39, 46 (1932). The Natives were not exempt from Territorial law, but subject to Tribal customs which merited recognition.[26]

ANCSA itself included implicit recognition that Alaska's Natives were members of distinct tribal communities. The statute lists over 200 such communities, 43 U.S.C. §§ 1610, 1615, with additional communities able to qualify if they consisted of at least 25 residents of an "established village," with a majority Native population, "not of a modern or urban character," *id.* The statute explicitly acknowledges the importance of the recognition of membership in these pre-existing Native communities, defining the term "Native" to include any U.S. citizen "who is regarded as an Alaska Native by the Native village or Native group *of which he claims to be a member* and whose father or mother is (or, if deceased, was) regarded as Native by any village or group," 43 U.S.C. § 1602(b) (emphasis added). (The statute did not require that new corporations replace the Villages' governing

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[26] Petitioner's echo of the concern of the dissent below that "Alaska law no longer applies to every Alaskan," Pet. 6, is thus either incorrect or insignificant. Alaska law still applies to every Alaskan, Native or non-Native, in or out of Indian country, and in that sense the statement is incorrect. Some Alaskans may, in their child custody disputes, be subject to the laws and courts of another jurisdiction, but that is nothing new; under long-standing jurisdictional principles, it has always been the case that any Alaskan may find himself litigating his child custody disputes in the courts of, and under the laws of, Florida or Arizona or any other State. In that sense, the statement is insignificant, in that Alaska law has never applied to every Alaskan.

councils; and today in Alaska most villages have both a governmental council and a corporation board.)

Dozens of post-ANCSA enactments indicate Congressional intent to include Alaska Native Villages in most major Indian legislation, *e.g.*, the Indian Financing Act of 1974, Pub. L. No. 93-262, § 3(c), 88 Stat. 77, codified at 25 U.S.C. § 1452(c); the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, § 4, 88 Stat. 2204, codified at 25 U.S.C. § 450b(e); the Indian Health Care Improvement Act of 1976, Pub. L. No. 94-437, § 4, 90 Stat. 1401, codified as amended at 25 U.S.C. § 1603(d); the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 4, 92 Stat. 3069, codified at 25 U.S.C. § 1903(8); and the Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, § 203, 96 Stat. 2607, 2626, codified at 26 U.S.C. § 7701(a)(40); all of which expressly provide for inclusion of Alaska tribes. The petition characterizes such statutes as "for the narrow purpose of eligibility for programs and services," Pet. 29 fn. 11. However, even if that were true, eligibility for these programs and services cannot validly be premised on the fact that the peoples to whom the "narrow purpose" applies are of a particular racial extraction; it must be premised on these Natives' status as members of Native polities, *i.e.*, tribes. *See Morton v. Mancari*, 417 U.S. 535 (1974).

Eventually, the list of Congressional enactments recognizing Alaska Native Villages as tribes grew too lengthy to be accurately characterized as limited to "narrow purposes," and the Secretary acknowledged that in formally recognizing the existence of the listed tribes in Alaska.

Even if this Court were prepared to overrule its seasoned precedent – that "it is the rule of this court to follow the action of the Executive and other Political Departments of the Government, whose more special duty it is to determine such affairs. If by them those

Indians are recognized as a tribe, this court must do the same," *United States v. Holliday*, 70 U.S. 407, 419 (1866) – the historical arguments presented by petitioner here provide no reason to do so in this case.

CONCLUSION

This Court should deny the petition.

Respectfully Submitted,

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